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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA

11                  CHARLOTTE COFFANEY,

12                  Plaintiff,

13                  v.

14                  CAROLYN W. COLVIN, Acting  
15                  Commissioner of Social Security

16                  Defendant.

17                  CASE NO. 3:15-CV-05830-MJP-DWC

18                  REPORT AND RECOMMENDATION  
19                  ON PLAINTIFF'S COMPLAINT

20                  Noting Date: June 3, 2016

21                  The District Court has referred this action, filed pursuant to 42 U.S.C. § 405(g), to United  
22                  States Magistrate Judge David W. Christel. Plaintiff seeks judicial review of the denial of  
23                  Plaintiff's application for Supplemental Security Income ("SSI") benefits.

24                  The Court concludes, in light of the medical opinion evidence submitted to the Appeals  
25                  Council from Plaintiff's treating physician, the Administrative Law Judge's ("ALJ") residual  
26                  functional capacity finding was not supported by substantial evidence in the record as a whole.  
27                  Therefore, the undersigned recommends the entry of an Order reversing and remanding the  
28                  ALJ's decision, pursuant to sentence four of 42 U.S.C. § 405(g), for further proceedings.

## **PROCEDURAL & FACTUAL HISTORY**

2 On June 27, 2012, Plaintiff filed an application for SSI.<sup>1</sup> See Dkt. 11, Administrative  
3 Record (“AR”) 108, 116. Plaintiff alleges she became disabled due to chronic back pain,  
4 arthritis, and neurosarcoma. See AR 136. Plaintiff’s application was denied upon initial  
5 administrative review and on reconsideration. See AR 41-42. A hearing was held before ALJ  
6 Steve Lynch on March 4, 2014, at which Plaintiff, represented by counsel, appeared and  
7 testified. See AR 284.

8 On March 21, 2014, the ALJ found Plaintiff was not disabled within the meaning of  
9 Section 1614(a)(3)(A) of the Social Security Act. AR 27. Plaintiff's request for review of the  
10 ALJ's decision was denied by the Appeals Council on September 10, 2015, making that decision  
11 the final decision of the Commissioner of Social Security (the "Commissioner"). *See* AR 4, 20  
12 C.F.R. §§ 404.981, 416.1481. On November 16, 2015, Plaintiff filed a complaint in this Court  
13 seeking judicial review of the Commissioner's final decision.

14 Plaintiff argues the denial of benefits should be reversed and remanded for further  
15 proceedings, because significant, probative evidence considered for the first time by the Appeals  
16 Council leaves the ALJ's decision unsupported by substantial evidence in the record as a whole.  
17 Dkt. 13, p. 1.

I. Whether the ALJ's Decision was Supported by Substantial Evidence, in Light of a Medical Opinion from Plaintiff's Treating Physician which was Submitted to the Appeals Council and Incorporated into the Administrative Record.

20 After the ALJ issued his decision, but before the Appeals Council denied review,  
21 Plaintiff's treating physician, Tracy Williams, M.D., rendered an opinion as to Plaintiff's severe

<sup>1</sup> This is Plaintiff's second application for SSI. AR 16. Plaintiff had previously applied for SSI and been denied by an ALJ on October 29, 2010. AR 56, 64.

1 impairments and associated limitations. AR 248-49. The Appeals Council considered Dr.  
2 Williams' opinion as part of the record, but "found that this information does not provide a basis  
3 for changing the [ALJ's] decision." AR 4-5. Plaintiff argues this new medical opinion invalidates  
4 the ALJ's findings Plaintiff was capable of light work and was not disabled, as they are no longer  
5 supported by substantial evidence in the record as a whole.

6 **A. Standard**

7 A Court may consider new evidence which was presented for the first time to the Appeals  
8 Council when evaluating whether or not "in light of the record as a whole, the ALJ's decision  
9 was supported by substantial evidence and was free of legal error." *Taylor v. Comm'r of Soc.*  
10 *Sec. Admin.*, 659 F.3d 1228, 1231 (9th Cir. 2011).

11 Defendant argues this Court does "not have jurisdiction to review a decision of the  
12 Appeals Council denying a request for review of an ALJ's decision, because the Appeals  
13 Council decision is a non-final agency action." *Brewes v. Comm'r of Soc. Sec. Admin.*, 682 F.3d  
14 1157, 1159-60 (9th Cir. 2012). Defendant also argues a court cannot consider evidence which  
15 was not before the ALJ without conducting an analysis under Sentence Six of 42 U.S.C. §  
16 405(g). Specifically, Defendant argues the Court may not remand the case based upon Dr.  
17 Williams' opinion, unless Dr. Williams' opinion is new and material evidence, and Plaintiff  
18 shows good cause for failing to provide Dr. Williams' opinion earlier in the administrative  
19 proceedings. Dkt. 14, p. 7. 42 U.S.C. § 405(g).

20 Defendant's argument, however, rests on a misunderstanding of the procedural posture of  
21 this case. Plaintiff is not seeking review of the Appeals Council's decision, nor is the Court  
22 required to apply Sentence Six of 42 U.S.C. § 405(g) in order to review Dr. Williams' opinion.  
23 Instead, as in *Brewes*, Plaintiff argues the evidence submitted to the Appeals Council—and  
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1 included in the administrative record—means the *ALJ*'s final decision was not supported by  
 2 substantial evidence. As the *Brewes* court concluded, this is proper. Courts may only review final  
 3 agency actions, and the *ALJ*'s decision—rather than the Appeals Council's decision to decline  
 4 review—is a final agency action. *See Taylor*, 659 F.3d at 1231 (*citing Klemm v. Astrue*, 543 F.3d  
 5 1139, 1144 (9th Cir. 2008); 20 C.F.R. §§ 404.981, 416.1481. However, courts must also review  
 6 an *ALJ*'s decision for substantial evidence in the administrative record, and “the administrative  
 7 record includes evidence submitted to and *considered* by the Appeals Council.” *Brewes*, 682  
 8 F.3d at 1162 (emphasis added). Unlike a situation where the Appeals Council declines to  
 9 consider new evidence and thus does not incorporate the evidence into the administrative  
 10 record,<sup>2</sup> “when the Appeals Council considers new evidence in deciding whether to review a  
 11 decision of the *ALJ*, that evidence becomes part of the administrative record, which the district  
 12 court must consider when reviewing the Commissioner's final decision for substantial evidence.”  
 13 *Brewes*, 682 F.3d at 1163.

14 Here, Plaintiff submitted a new medical opinion from Plaintiff's treating physician, Dr.  
 15 Williams, to the Appeals Council on July 6, 2015. AR 250.<sup>3</sup> The Appeals Council actually  
 16 considered this evidence and incorporated it into the administrative record, but found it did not

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 18       <sup>2</sup> In these situations, the only way a court may consider this evidence is through Sentence Six of  
 19 42 U.S.C. § 405(g). *See, e.g., Knipe v. Colvin*, 2015 WL 9480026, at \*5-6 & n.7 (D. Or. 2015) (reviewing  
 20 evidence submitted to, but *not* considered by the Appeals Council nor included in the administrative  
 record, under Sentence Six of 42 U.S.C. § 405(g)); *Winland v. Colvin*, 2014 WL 4187212, at \*4 (W.D.  
 Wash. 2014) (reviewing evidence submitted to, but *not* considered by, the Appeals Council, under  
 Sentence Six of 42 U.S.C. § 405(g)).

21       <sup>3</sup> There is some dispute in the record as to whether Dr. Williams' opinion was actually submitted  
 22 to the *ALJ* prior to the date of the *ALJ*'s written decision. *See AR 27* (the *ALJ*'s written decision was  
 23 dated March 21, 2014), 249 (date-stamp on Dr. Williams' opinion of March 5, 2014), 252 (representing  
 Plaintiff's counsel submitted Dr. Williams' opinion to the *ALJ* twice before March 10, 2014).  
 Nonetheless, because Dr. Williams' opinion was considered by the Appeals Council and incorporated into  
 the administrative record, the exact date when Plaintiff first submitted Dr. Williams' report to the *ALJ* is  
 immaterial to the Court's analysis. For the reasons set forth herein, the Court still considers Dr. Williams'  
 opinion in assessing whether the *ALJ*'s decision was supported by substantial evidence in the record as a  
 whole.

1 constitute a basis for reversing the ALJ's decision. AR 5, 248-49. Thus, Dr. Williams' opinion is  
 2 properly before the Court, and the Court may consider it when determining whether the ALJ's  
 3 decision was supported by substantial evidence in the record as a whole. *See Brewes*, 682 F.3d at  
 4 1163.

5 **B. Application of Standard**

6 Dr. Williams was Plaintiff's primary care physician from July 21, 2009 through the date  
 7 of her opinion. AR 248. On March 5, 2014, Dr. Williams found Plaintiff "carries the diagnoses  
 8 of multilevel lumbar degenerative disc diseases, neurofibromatosis type 1, hypertension,  
 9 prediabetes, and obesity." AR 248. Dr. Williams opined Plaintiff's various conditions medically  
 10 equaled Social Security listing 1.04 for disorders of the spine, and, due to Plaintiff's conditions:

11 [s]he should not lift more than 10 pounds frequently throughout a work day. She  
 12 can stand and walk for about 30 mintues [sic] at a time but should only stand and  
 13 walk for a combinied [sic] total of less than 2 hours throughout a work day. She  
 14 can sit about 30 minutes at a time but should only sit for less than 6 hours  
 15 throughout a work day. It is necessary for her to alternate between sitting,  
 16 standing, and lying down every 15 to 20 minutes to alleviate pain and numbness.  
 17 She may lie down for more prolonged periods. She should not be engaging in  
 18 postural activities like climbing, balancing, stooping, bending, kneeling,  
 19 crouching or crawling as these activities exacerbate her pain. She should only  
 20 occasionally reach throughout the day due to her shoulder and back pain.

21 AR 248. Dr. Williams also opined Plaintiff would need to miss two or more days a month from  
 22 even a simple, routine, and sedentary job. AR 248.

23 Plaintiff argues this opinion constitutes significant probative evidence which renders the  
 24 ALJ's decision, in light of the record as a whole, unsupported by substantial evidence. The Court  
 agrees.

An ALJ must consider every medical opinion, regardless of its source. 20 C.F.R. §§ 404.1520; 404.1527(b) & (c). Further, an ALJ may not reject significant, probative evidence without explanation. *Flores v. Shalala*, 49 F.3d 562, 571 (9th Cir. 1995) (*quoting Vincent v.*

1 *Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984)). If an ALJ does not consider significant, probative  
 2 evidence favorable to a claimant's position, the ALJ "thereby provide[s] an incomplete residual  
 3 functional capacity determination." *Hill v. Astrue*, 698 F.3d 1153, 1161 (9th Cir. 2012).

4 Defendant, citing *Burton v. Heckler*, argues the Court should only reverse and remand a  
 5 case based on new evidence presented to the Appeals Council if the evidence is material and  
 6 creates "reasonable possibility of changing the outcome of the ALJ's determination." Dkt. 14, p.  
 7 8 (citing *Burton v. Heckler*, 724 F.2d 1415, 1417 (9th Cir. 1984)). However, the section of  
 8 *Burton* cited by Defendant is interpreting the materiality requirement for a remand under  
 9 Sentence Six of 42 U.S.C. § 405(g). As discussed in Section I(A), above, Sentence Six does not  
 10 apply to this case. Thus, the analysis in *Burton* is inapposite.

11 In any event, Dr. Williams' opinion does create a reasonable possibility of changing the  
 12 outcome of the ALJ's determination. Because Dr. Williams was Plaintiff's treating physician,  
 13 her opinion would have been entitled to deference had it been before the ALJ. *See Lester v.*  
 14 *Chater*, 81 F.3d 821, 831 (9th Cir. 1996) (holding an ALJ must provide "clear and convincing"  
 15 reasons for rejecting the uncontradicted opinion of a treating physician, or "specific and  
 16 legitimate" reasons for rejecting the contradicted opinion of a treating physician). Further, Dr.  
 17 Williams' opined limitations are substantially more restrictive than those included in the ALJ's  
 18 residual functional capacity determination. AR 21. For example, though the ALJ found Plaintiff  
 19 was capable of performing some light work with additional exertional restrictions,<sup>4</sup> Dr. Williams  
 20 opined to limitations which would restrict Plaintiff to, at best, sedentary work. AR 248; 20

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 22       <sup>4</sup> The ALJ found Plaintiff was capable of performing light work as defined in 20 C.F.R. §  
 23 416.967(b), except "the claimant can stand and walk no more than four hours in an eight-hour day. She  
 24 cannot climb ladders, ropes or scaffolds. She can no more than occasionally climb ramps and stairs. She  
 must avoid concentrated exposure to hazards in the workplace. She is limited to simple, entry-level work  
 in a routine environment. She can do no work requiring written instructions, written reports, or math  
 calculations." AR 21.

1 C.F.R. § 416.967(a). In fact, Dr. Williams' opinions Plaintiff would need to alternate between  
 2 sitting and standing every fifteen to twenty minutes, and would be absent from her job at least  
 3 two days per month, suggest Plaintiff might be more limited than even sedentary work. In light  
 4 of this significant, probative evidence, the ALJ's conclusion Plaintiff has the residual functional  
 5 capacity to perform light work subject to additional restrictions is not supported by substantial  
 6 evidence, and requires remand for the ALJ to consider Dr. Williams' opinion.

7       II.     Whether the Case Should be Remanded for an Award of Benefits or Further  
 8                   Proceedings.

9       Plaintiff argues the case should be reversed and remanded for the award of benefits,  
 10 rather than for further proceedings.

11       Generally, when the Social Security Administration does not determine a claimant's  
 12 application properly, "the proper course, except in rare circumstances, is to remand to the agency  
 13 for additional investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir.  
 14 2004) (citations omitted). However, the Ninth Circuit has established a "test for determining  
 15 when [improperly rejected] evidence should be credited and an immediate award of benefits  
 16 directed." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (*quoting Smolen*, 80 F.3d at  
 17 1292. This test, often referred to as the "credit-as-true" rule, allows a court to direct an  
 18 immediate award of benefits when:

- 19           (1) the ALJ has failed to provide legally sufficient reasons for rejecting such  
 20 evidence, (2) there are no outstanding issues that must be resolved before a  
 21 determination of disability can be made, and (3) it is clear from the record that the  
 22 ALJ would be required to find the claimant disabled were such evidence credited.

23       *Harman*, 211 F.3d at 1178 (*quoting Smolen*, 80 F.3d at 1292). *See also Treichler v.*  
 24       *Commissioner of Social Sec. Admin.*, 775 F.3d 1090, 1100 (9th Cir. 2014), *Varney v. Sec'y of*  
 25       *Health & Human Servs.*, 859 F.2d 1396 (9th Cir. 1988). Further, even if the ALJ has made the

1 three errors under *Harman* and *Smolen*, such errors are relevant only to the extent they impact  
 2 the underlying question of Plaintiff's disability. *Strauss v. Commissioner of the Social Sec.*  
 3 *Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011). "A claimant is not entitled to benefits under the  
 4 statute unless the claimant is, in fact, disabled, no matter how egregious the ALJ's errors may  
 5 be." *Id.* (citing *Briscoe ex rel. Taylor v. Barnhart*, 425 F.3d 345, 357 (7th Cir. 2005)). Therefore,  
 6 even if the credit-as-true conditions are satisfied, a court should nonetheless remand the case if  
 7 "an evaluation of the record as a whole creates serious doubt that a claimant is, in fact, disabled."  
 8 *Garrison*, 759 F.3d at 1021 (citing *Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir. 2004)).

9 Here, outstanding issues must be resolved. Despite Plaintiff's argument the record is fully  
 10 developed and no outstanding issues need to be resolved, Dr. Williams' opinion conflicts with  
 11 the less restrictive opinions of the state agency medical consultants, and the record otherwise  
 12 contains conflicting evidence concerning the degree and significance of Plaintiff's impairments.  
 13 AR 25, 32-35. Thus, there is insufficient evidence in the record to establish Plaintiff should be  
 14 found disabled as a matter of law, and the case should be remanded for additional proceedings.  
 15 See *Harman*, 211 F.3d at 1180. See also *Treichler*, 775 F.3d at 1104-06.

16 **CONCLUSION**

17 Based on the above stated reasons and the relevant record, the undersigned concludes the  
 18 ALJ's finding Plaintiff was capable of light work, and was not disabled, was not supported by  
 19 substantial evidence. The undersigned recommends this matter be reversed and remanded,  
 20 pursuant to sentence four of 42 U.S.C. § 405(g), for further proceedings. The undersigned  
 21 recommends judgment be entered for Plaintiff and the case closed.

22 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have  
 23 fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P.  
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1   6. Failure to file objections will result in a waiver of those objections for purposes of de novo  
2 review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C). Accommodating the time limit  
3 imposed by Rule 72(b), the clerk is directed to set the matter for consideration on June 3, 2016,  
4 as noted in the caption.

5                     Dated this 20th day of May, 2016.

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8                     David W. Christel  
9                     United States Magistrate Judge  
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